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Save Beaver County, The Beaver River, and Varied Estates v. Beaver County, Beaver County Planning Commission, and Beaver County Board of County Commissions : Reply Brief of Appellants

Utah Court of Appeals

IN THE UTAH SUPREME COURT

SAVE BEAVER COUNTY, THE BEAVER RIVER, AND VARIED ESTATES (BRAVE), A Utah Non-Profit Corporation Plaintiff, v. **BEAVER COUNTY; BEAVER COUNTY PLANNING COMMISSION;** and the **BEAVER COUNTY BOARD OF COUNTY COMMISSIONERS,** Beaver County Governmental Entities Defendants, **CPB Development, L.C.; and Mount Holly Partners, L.L.C.,** Intervenors.	:	Court of Appeals No. 20070656 District Court No. 070500036

REPLY BRIEF OF APPELLANTS

Appeal from the Judgment and Order of the Fifth Judicial District, the Honorable John Walton, Presiding

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I. INTRODUCTION.

This appeal is atypical. In a typical appeal of a bench trial, the appellant must overcome adverse factual findings. Here, the trial court entered extensive factual findings but those findings, without significant exception, are entirely consistent with the position advocated by BRAVE. The trial court also resolved many legal issues in favor of BRAVE. To the extent CPB/Mount Holly disagree with the trial court's legal analysis, CPB/Mount Holly failed to timely pursue a cross appeal and no issue sought to be reviewed by CPB/Mount Holly is before this Court. *See* 2008 UT App. 21.

Consequently, the major issues on appeal are whether two legal conclusions must be set aside as incorrect. The trial court, recognizing the importance of these legal questions, strongly invited an appeal because of concern over the correctness and importance of these rulings. Order, R 1921 (explaining decision to rule on all issues "in an effort to resolve an issue that may be necessary on appeal."). The two legal issues on appeal are first, whether the Constitutional right of referendum must be allowed to be exercised by citizens of Beaver County given Beaver County's unwavering position prior to litigation that Ordinance No. 2007-04 is "legislative?" The second issue, which need be addressed only if the first issue is decided contrary to BRAVE's interests, is whether the many amendments to existing law as found in Ordinance No. 2007-04 represent a change in some "policy" of the County and are legally "material."

The Brief of Appellees/Intervenors CPB Development, L.C. and Mount Holly Partners, L.L.C. ("Intervenors' Brief") goes to extraordinary lengths to obscure the reality that these are the two central issues on appeal and that the standard of review is correctness. *See Citizens for Responsible Transportation v. Draper City*, 2008 UT 43, ¶ 8, 608 Adv. Rep. 12 ("the district court's determination that [a law] is not subject to referendum is a legal conclusion to which we give no particular deference and which we review for correctness").

On the first issue of "estoppel" and Beaver County's pre-litigation conduct, CPB/Mount Holly's arguments are an untimely attack upon the trial court's findings favorable to BRAVE. Specifically, CPB/Mount Holly takes issue with the trial court's finding that estoppel applies despite CPB/Mount Holly's failure to marshal all evidence favorable to the trial court's finding. *Compare* Intervenors' Brief at 23-29 *with* Order, R 1898-1902. Next, CPB/Mount Holly reargue their position that BRAVE needed to plead an estoppel "claim" although the trial court ruled otherwise. *Compare* Intervenors' Brief at 29-31 *with* Order, R 1901. Lastly, CPB/Mount Holly reargue that Ordinance No. 2007-04 can be both legislative and administrative at the same time, again contrary to the trial court's ruling. *Compare* Intervenors' Brief at 25-27 *with* Order, R 1900.

CPB/Mount Holly's arguments directed at the trial court's analysis of the factors stated in *Citizens Awareness Now v. Marakis*, 873 P.2d 1117 (Utah 1994) are equally devoid of actual substance. **Despite filing a 51 page brief, CPB/Mount Holly never once directly addresses any of the specific changes to existing law identified by the**

trial court as present in Ordinance No. 2007-04. CPB/Mount Holly adopts this tactic despite BRAVE's extensive discussion of these changes in its opening brief. *See* Appellants' Brief at 14 (SOF ¶¶ 19-43), 31-33, 42-53 In the place of analysis, CPB/Mount Holly provide characterizations and metaphors, labeling such changes as "shards of glass," "snowflakes," and "grains of sand," and "minute instances of alleged discrepancies and differences." Intervenors' Brief at 42. BRAVE believes that once this Court evaluates each of the changes to existing law, including the cumulative impact of such changes, this Court will agree with BRAVE that the trial court, despite the best of intentions, simply reached two incorrect legal conclusions.

II. THE TRIAL COURT'S FINDING OF "ESTOPPEL" MANDATES THAT THE CITIZENS' RIGHT OF REFERENDUM BE ENFORCED.

A. The Citizens' Right of Referendum Must be Specifically Enforced.

CPB/Mount Holly concede that "Beaver County [is] estopped from asserting Ordinance No. 2007-04 [is] 'administrative under *Marakis* [and] [n]either BRAVE nor Beaver County appeals this decision." Intervenors' Brief at 20. Further, CPB/Mount Holly concedes that the right to pursue referendum of legislative acts "is a fundamental right." Intervenors' Brief at 39. Most significantly, CPB/Mount Holly concede that as a private landowner and a developer, they have no involvement in the exercise of this fundamental right:

> [T]he Landowners, being non-governmental entities without decision-making powers, were not in a position to grant or take away any rights belonging to BRAVE. Obviously, BRAVE's right to referendum . . . did not and could not hinge on the Landowner's

> characterization of the Development Agreement as . . . legislative. . . . [T]he Landowners were in no position to cause injury to BRAVE. And, in fact, BRAVE has suffered no injury as a result of the Landowners. . . . It is also undisputed that BRAVE timely filed its referendum petition and was not precluded . . . from doing so by any representations or statements of the Landowners.

Id. at 28-29.

Despite conceding that they have no "dog in the fight," CPB/Mount Holly nevertheless take the position that its arguments as an intervenor that Ordinance No. 2007-04 is "administrative" somehow override the trial court's resolution of this key issue as between Beaver County and its citizens. CPB/Mount Holly never explain how a private party can take away a constitutional right and this Court has unambiguously stated that the interests of private landowners are always secondary because "the people's referendum right is of such importance . . . it properly overrides 'individual economic interests.'" *Mouty v. Sandy City Recorder*, 2005 UT 41, ¶ 15, 122 P.3d 521.

Instead of explaining how CPB/Mount Holly can change the outcome of a dispute that is admittedly between a government and its citizens, CPB/Mount Holly instead leaps to the inconsistent position that BRAVE must demonstrate that CPB/Mount Holly **personally** took away the citizens' right to referendum through "estoppel" conduct **by** CPB/Mount Holly. Intervenors' Brief at 22-29.

CPB/Mount Holly's argument collapses under its own weight. If, as CPB/Mount Holly concedes, they are "non-governmental entities without decision-making powers [who are] not in a position to grant or take away any rights belonging to BRAVE"

(Intervenors' Brief at 28), then whatever position or action was taken by CPB/Mount Holly is irrelevant. Once the trial court found that Beaver County is estopped to contend that Ordinance No. 2007-04 is anything other than "legislative," the inquiry ends. The right of referendum is a fundamental right of the **citizens** and "individual economic interests" are subordinate. *Mouty*, 2005 UT 41, ¶ 115.

It is also clear that the question of whether CPB/Mount Holly must itself have engaged in "estoppel" conduct is a question of law, not a question upon which BRAVE must "marshal" evidence. The answer to that legal question is provided in *Mouty's* holding that the right of referendum overrides the interests of private landowners and, as CPB/Mount Holly state, a private party has no ability "to grant or take away [such] rights." Intervenors' Brief at 28. Further, BRAVE cited to extensive authority that when referendum or a similar right to vote is denied, the **only** remedy is to order enforcement of the voters' constitutional right. *See* Appellants Brief at 34-35. CPB/Mount Holly does not dispute (or even address) this uniform authority.

To the extent the trial court and CPB/Mount Holly cite *United States v. San Francisco*, 1992 US App. LEXIS 29986 and *Consolidated Edison Co. v. Herrington*, 752 F. Supp. 1082, 1087 (D. D.C. 1990) for the idea that an intervenor is not always "estopped" by another party's conduct, those cases do not deal with a fundamental constitutional right for which the intervenor admittedly has no say and for which the only available remedy is enforcement of the right to vote. *See also* Appellants Brief at 39, n.9

(discussing *United States v. San Francisco*, 1992 U.S. App. LEXIS 29986; and *Consolidated Edison Co. v. Herrington*, 752 F. Supp. 1082, 1087 (D. D.C. 1990)).

In addition, while CPB/Mount Holly can neither grant, nor deny, BRAVE's right to pursue referendum, the position that there is no evidence that CPB/Mount Holly joined in Beaver County's position that 2007-04 is "legislative" is simply untrue. Contrary to the baffling statement that such evidence is not presented (*see* Intervenors' Brief at 23, n.4), BRAVE detailed each of the relevant facts in its fact statement and further described such record evidence, with record citations, in a section of its brief devoted exclusively to this issue. *See* Appellants Brief, Section I.C., at 39-41.

This evidence includes that Beaver County and CPB/Mount Holly agreed to proceed by having the County "adopt[] a new law. . . Yes sir." Appellants Brief at 40, n.10 (record citations). CPB/Mount Holly signed and agreed to all terms of the document, including recitals that Ordinance No. 2007-04 is a legislative action of the County. *Id.* The trial court also made express findings that Beaver County and CPB/Mount Holly "discussed the fact that the Development Agreement would be adopted as a land use ordinance of Beaver County and Mount Holly/CPB agreed to such adoption as a land use ordinance." *Id.* at 40 (citing Order, R 1912). One reason for this agreement was that the parties wanted the County to proceed legislatively because "by legislative action potentially we had some more presumption of validity under the reasonably debatable standard." Order, R 1912 (citing R 2093 at 104 (Parker Test.)). Further, when Beaver County denied BRAVE's appeal for lack of jurisdiction to appeal a "legislative

act," CPB/Mount Holly sat by and did not contest this denial of jurisdiction despite its active participation in a prior administrative appeal as a "party in interest" with a statutory right to be heard. *See* Appellants Brief at 40-41 (record citation).

In short, all record evidence related to CPB/Mount Holly's pre-litigation conduct is presented. While CPB/Mount Holly could not "grant or take away any rights [to pursue referendum]" (Intervenors' Brief at 28), it is undeniable that every act or omission of CPB/Mount Holly prior to litigation was consistent with Ordinance No. 2007-04 being "legislative." While BRAVE believes that only Beaver County's conduct is legally relevant to estoppel, Beaver County and CPB/Mount Holly acted uniformly during this time frame and both recognized that Ordinance No. 2007-04 is "legislative."

The remainder of CPB/Mount Holly's arguments against estoppel are arguments rejected by the trial court. *See supra* Introduction at 2. Having failed to timely perfect an appeal (2008 UT App. 21), "law of the case" prevents CPB/Mount Holly from making these untimely arguments. *See Thurston v. Box Elder County*, 892 P.2d 1034, 1038, n.2 (Utah 1995) (one aspect of "law of the case" is that "a lower court ruling becomes binding on a higher court through failure of the parties to preserve an issue for review.").

Even if considered, CPB/Mount Holly's arguments lack merit. With respect to "waiver," CPB/Mount Holly argue estoppel should have been plead. In this unique case, however, no responsive pleadings had been filed at the time of trial and Beaver County consistently maintained that Ordinance No. 2007-04 was "legislative" until just prior to

trial, including a written opinion of the Beaver County Attorney. Order, R 1899-1900 (citing Plaintiffs' Ex. 24 at 1). As stated by the trial court:

> Plaintiffs' failure to raise the issue of estoppel prior to the County's change of position did not amount to a waiver. In this case the County had not even filed an answer by the date of trial, so Plaintiffs were not required to include estoppel in their pleading. U.R.C.P. 8(c) (providing that "[i]n *pleading to a preceding pleading*, a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense").

Order R 1900 (emphasis by trial court). Further, CPB/Mount Holly admit that one of the issues agreed to be tried was whether Ordinance No. 2007-04 is subject to a referendum vote, including that Beaver County had "made an admission that its actions were legislative." Intervenors' Brief at 11. CPB/Mount Holly further admit that the issue of estoppel was fully briefed prior to trial (*id.* at 31, n.8) and that the issue was actually tried. *See* Order R 1898-1902. In these circumstances, the trial court's ruling that estoppel has not been "waived" must be upheld. *See Big Butte Ranch, Inc. v. Holm*, 570 P.2d 690, 692 (Utah 1977) (Although "estoppel is an affirmative defense [that] was not raised in the pleadings . . . the evidence offered at trial supported the principle and a motion to amend the pleadings to conform to the evidence was granted and absent a showing of abuse of discretion and resultant prejudice we are constrained to support the trial court's findings and conclusions.").[1]

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[1]CPB/Mount Holly's argument that not all of the elements of estoppel are present as applied to Beaver County is inconsistent with the trial court's detailed findings. Order, R 1898-1902. Moreover, CPB/Mount Holly has made no attempt to marshal the evidence favorable to the court's detailed findings, including that the County's change in position

In short, because CPB/Mount Holly has no "dog in the fight" related to estoppel and referendum, its actions or inactions are irrelevant. The constitutional right of referendum exists as between Beaver County and its citizens. The **only** remedy for the County's "estopp[el] from asserting Ordinance No. 2007-04 [is] administrative under *Marakis*" (Intervenors' Brief at 20) is to order a referendum vote.

B. The Trial Court Also Erred by Allowing the Intervenors to Assert an Affirmative Post-Trial Claim.

The trial court's post-trial ruling that referendum can be defeated based upon the legal arguments of CPB/Mount Holly alone is legally incorrect for two reasons. First, as CPB/Mount Holly now concede, they have no right or ability to grant or deny referendum. Intervenors' Brief at 28.

Second, it is only by allowing the creation of a new "claim," independent of the County, that a judgment in favor of BRAVE was denied. No such claim was ever filed and the trial court's pre-trial ruling **prohibited** such a filing. Specifically, CPB/Mount Holly were allowed to intervene only upon the condition that they not modify the issues presented in the plaintiffs' claims against Beaver County (the only claims in the case)

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made on the eve of trial after a prior denial of administrative appeals is inconsistent with "good faith." Also, contrary to CPB/Mount Holly's claim, Beaver County never took the position that ordinance No. 2007-04 is "administrative" for some purposes but "legislative" for others. To the contrary, the Beaver County Attorney offered the legal opinion that Ordinance No. 2007-04 is legislative. Order, R 1899-1900 (citing Plaintiffs' Ex. 24 at 1). While CPB/Mount Holly did make this argument **after** litigation began, it was rejected by the trial court because "Intervenors have presented the Court with no legal authority or reasoning to support this conclusory argument." Order, R 1901, n.12.

unless prior court approval was obtained after a hearing. R 1883-85. Prior to trial, no such permission was granted and the issue at trial was whether Beaver County must recognize the citizens' right to refer Ordinance No. 2007-04 to a vote. Consequently, when the trial court ruled in favor of BRAVE on its claim against Beaver County after a trial, a judgment should have been entered ordering specific performance.

III. ORDINANCE NO. 2007-04 MATERIALLY AMENDS AND SUPPLEMENTS EXISTING ZONING ORDINANCES.

A. Ordinance No. 2007-04 Changes the Policy Reflected in Existing Law.

CPB/Mount Holly devote a substantial section of their brief to the general argument that zoning matters are not appropriately subject to referendum. While this Court has recognized that in other jurisdictions zoning matters are sometimes "excluded from the referendum process altogether," the Utah Constitution provides otherwise. *Mouty*, 2005 UT 41, ¶ 32. As stated by this Court:

> our state constitution retains for the people a relatively broad referendum power, which we have previously interpreted as extending to all legislative acts taken by a municipal [or county] government. . . . [T]he [Utah] legislature has previously endorsed our line of cases concluding that **legislative zoning acts are subject to referenda**.

Id. at ¶ 34 (emphasis added). This right to pursue a referendum is a "sacrosanct and a fundamental right" that Utah courts must defend and maintain inviolate. *Gallivan v. Walker*, 2002 UT 89, ¶ 27, 54 P.3d 1069.

In addition to underestimating the citizens' fundamental right of referendum for legislative zoning, CPB/Mount Holly takes the evasive tact of refusing to discuss what

Ordinance No. 2007-04 actually does or does not do. *See* Intervenors' Brief at 40-51. Instead, CPB/Mount Holly misleadingly characterize the many amendments and modifications of existing zoning laws within Ordinance No. 2007-04 as "**alleged** discrepancies and differences." *Id.* at 42 (emphasis added). To the contrary, these changes are not "allegations" but rather the trial court made express factual findings that each one of the changes presented by BRAVE in fact exists. Order, R 1921 ("the Zoning Ordinance and Subdivision Ordinance have undoubtedly been amended in the particulars noted by Plaintiffs"); *see also* Appellants Brief at 14-24 (SOF ¶¶ 19-43) (detailing each difference as found by the trial court). CPB/Mount Holly instead deride these changes to existing law calling them " minute instances of . . . discrepancies and difference," "microscopic specifics," "shards of glass," "snowflakes," and "grains of sand." Intervenors' Brief at 42.

CPB/Mount Holly's rhetoric is unhelpful and contrary to *Marakis*. Under *Marakis*, a reviewing court must "look to the substance of the [local government's] action to determine if it is legislative or administrative." *Low v. City of Monticello*, 2002 UT 90, ¶ 24, 54 P.3d 1153; *see also Citizens for Responsible Transportation*, 2008 UT 43, ¶ 12 ("what an action accomplishes determines if it is legislative or administrative in nature"). The starting point in a substantive analysis is "the plain language of the ordinance, council meeting minutes [and] the intent of the enacting authority." *Marakis*, 873 P.2d at 1124.

CPB/Mount Holly fail to address this critical aspect of *Marakis* even though the trial court found an express intent to act legislatively. Specially, an unambiguous intent is stated in Ordinance No. 2007-04 to create a new land use ordinance (Appellants Brief at 7-24, SOF ¶¶ 3, 5-7), pursuant to the exercise of legislative authority (*id.* at ¶¶ 3-5), "in furtherance of [the County's] public policies including its land use policies." *Id.* at ¶ 4. The County and CPB/Mount Holly also intended to "clarif[y] and supplement[] the Land Use Ordinances of the County" (*Id.* at ¶ 8), including amendments to bring the law into compliance with LUDMA. *Id.* at ¶¶ 16-43. On top of this plain language, the undisputed evidence at trial was that the County treated its adoption of Ordinance No. 2007-04 as legislative action (as CPB/Mount Holly stood by), including denying appeals precisely because Ordinance No. 2007-04 is not implementation of existing law. *Id.* at ¶¶ 51-58. The County and CPB/Mount Holly also hoped to obtain a more favorable standard of review associated with legislative action. *Id.* at ¶ 12. The trial court also made other detailed factual findings that the Beaver County Board of County Commissioners ("BOCC") was instructed to evaluate policy and that the BOCC acted to create "law," it acted "legislatively," including creating a "land use law for an area . . . of this size and magnitude and uniqueness." *Id.* at ¶¶ 9-10. In light of these facts, the trial court plainly found an intent "to act legislatively." *Id.* at ¶ 2.

Despite the absence of any dispute on the County's intent to act legislatively, CPB/Mount Holly nevertheless accuse BRAVE of failing to address the "policies" of Beaver County as reflected in this legislation. In truth, it is CPB/Mount Holly who have

refused to address public "policies," since policy can only be evaluated by looking at each change in existing law, a process CPB/Mount Holly steadfastly refuses to undertake. *See* Intervenors' Brief at 34-51.

In reality, *Marakis* holds opposite of CPB/Mount Holly's approach. *Marakis* does not hold that individual changes should be ignored and only a "global" view undertaken. Rather, *Marakis* counsels that individual changes may, in isolation, be deceiving because what first appears to be administrative may ultimately be legislative when considered in the context of a "cumulative effect." 873 P.2d at 1121. Therefore, the correct approach is to look at each change and at the cumulative effect of all changes. When the correct approach is applied to Ordinance No. 2007-04 it is clear that several, if not all, of the changes made by Beaver County modify the public "policies" of the County. Cumulatively, the impact is obvious.

The best example to start with is Beaver County's change to the "open space" requirements of the Planned Unit Development ("PUD") portion of the Zoning Ordinance. This is the place where the trial court, lead astray by CPB/Mount Holly, made a critical misstep in interpreting existing Beaver County law. CPB/Mount Holly, by their complete silence, apparently no longer dispute that this legal error was made. Instead, as they did below, CPB/Mount Holly continue to stress that the PUD provisions of existing law provide "flexibility." Intervenors' Brief at 42-43. However, CPB/Mount Holly do not now argue, as they did below, **that every provision of the PUD statute is "waivable."** *Id.* Instead, CPB/Mount Holly merely cite to the trial court's obvious

misreading of existing law, but neither endorse nor disapprove of this erroneous legal conclusion. *Compare id.* at 15 (¶ 46) *with id.* at 42-43.

In reality, as detailed in Appellants Brief at 45-46, § 10.09.020 of the Zoning Ordinance does not allow waiver within a "P" zone of mandatory provisions. Appellants Brief at 45-46. To the contrary, the potential waivers are quite limited. *Id.* The statute's mandatory words ("requirements," "shall" and "will") do not support the waiver argument and would result in a complete absence of zoning, an absurd construction. *Id.* One example of a **mandatory** non-waivable provision of existing law is that within a planned zone "open space" (as expressly defined) must be pursued so that "adjacent properties will not be adversely affected." *Id.* at 48 (citing statute). The public policy behind this mandatory requirement is expressly stated to be to "guarantee that the open spaces remain perpetually in recreational use." *Id.* (citing statute).

Ordinance No. 2007-04 changes this clear **public policy of Beaver County** by stating that all open space requirements are eliminated because "no public open spaces are proposed." Appellants Brief at 48 (citing provision). This change to existing law is made although the involved property is 1,826 acres and the development would add 1,204 residential dwelling units to a County with only approximately 2,200 residential units to begin with. *See* Appellants Brief at 2. CPB/Mount Holly try to justify this clear change in public policy by arguing that within their gated, locked and private country club, the 1,826 acres will not have structures on every square inch. This argument is absurd

because existing law defines open space as one could expect: open to recreational use. *See id.* at 19, SOF ¶ 29 (citing statute).

As detailed previously, other "Required Conditions" of the existing PUD statute are amended by Ordinance No. 2007-04, including standards for maximum density or land use intensity, the creation of "permitted" uses and an approval process that does not exist under present law. *See* Appellants Brief at 48. When viewed individually, and cumulatively, as *Marakis* requires, it is obvious Beaver County has acted legislatively in making these many changes to the PUD law.

Rather than address these identified changes, CPB/Mount Holly instead place extraordinary emphasis on vague and general language within Beaver County's General Plan. According to CPB/Mount Holly, the General Plan statement that Beaver County has a "need for aggressive economic development" and desires "quality growth," somehow excuses an analysis of what Ordinance No. 2007-04 does or does not do in relation to existing laws. *See* Intervenors' Brief at 42-44. If true, then *Marakis* is meaningless because any zoning action, no matter how legislative, can always be justified as supportive of "economic development" and "quality growth."

Further, to the extent Beaver County's General Plan addresses items that are meaningful in the particular context of Ordinance No. 2007-04, CPB/Mount Holly again chooses not to address the relevant language. Importantly, the General Plan states an **express public "Policy"** of Beaver County related to water that is completely reversed by Ordinance No. 2007-04. As would be expected, water is of utmost importance in

Beaver County and an issue for which the public expressed great interest given the location of the proposed development at the headwaters of the County's water supply. *See* Appellants Brief at 3, 7-8, SOF ¶ 1. Despite proposing to develop 1,204 residential units, CPB/Mount Holly presented Beaver County with evidence of conditional water rights and feasibility for no more than 45 units. *Id.*

In the context of these facts, Beaver County's General Plan states a strict "Policy" that any developer must demonstrate water rights and feasibility at **every** stage of development from beginning to end. *Id.* at 14-15, SOF ¶ 20. This requirement of "up front" water within dry Beaver County is carried through to each one of the County's existing laws including the Subdivision Ordinance and the Zoning Ordinance. *Id.* at 14-16, SOF ¶¶ 20-21. Ordinance No. 2007-04 changes this important public policy of Beaver County, by allowing CPB/Mount Holly to proceed with development approvals without proof of water rights or feasibility. *Id.* at 16-17, SOF ¶¶ 22-24. The BOCC decided to change these laws, and the express public policy stated in the General Plan, despite being advised against such a change by its paid consultant and only after the developer stated its desire to not spend money purchasing water rights. *Id.* at 26, 47-48 (citing testimony).

It is also undisputed that the public outcry to Ordinance No. 2007-04 included concern over whether this developer has adequate water rights, whether this developer has a "wet" water supply, whether this developer should be required to demonstrate water rights and feasibility up front, and whether a different set of development rules should

apply to this developer. *Id.* at 3 (citing testimony). As the district court found, the citizens of Beaver County are interested in and understand the fundamental issues related to water and the associated impacts of a development of this magnitude upon Beaver County:

> Although the near infinitude of administrative details considered and spelled out in the Development Agreement would probably be difficult reading, to say the last, for the average citizen, the overall development scheme is well within the average person's comprehension. That is, it is not necessary to understand all the administrative minutiae in order to understand that, among other things, a private golf course, a private ski resort, and a gated community are planned, and to determine whether or not such development is in the best interests of the County.

Order, R 1925. CPB/Mount Holly never responds to the fact that Ordinance No. 2007-04 changes the public policy of Beaver County on the issue of water rights and feasibility, issues of extraordinary public policy concern.

CPB/Mount Holly also fails to address in its memorandum the wholesale elimination of the appeal chapter of the Zoning Ordinance for this 1,826 acres, including elimination of the County Board of Adjustment as the reviewing authority. *See* Appellants Brief at 47. Instead, Ordinance No. 2007-04 makes the BOCC the appeal authority despite its dual status as the decision-making body. *Id.* CPB/Mount Holly does not address this or any other change in the law because it cannot credibly argue that eliminating an appeal body does not change public "policy."

CPB/Mount Holly's response to the fact that Ordinance No. 2007-04 puts a freeze on future zoning laws and the administration thereof (Appellants Brief at 49 and SOF

¶ 43) is likewise extraordinarily weak. CPB/Mount Holly argue that the ten year life of the agreement, with a potential extension for ten more years, means it "is not even permanent in nature." Intervenors' Brief at 45. To the contrary, cases in other jurisdictions evaluating similar development agreements have recognized that action to freeze zoning for any period is legislative. *See Santa Margarita Area Residents Together v. San Luis Obispo County*, 84 Cal. App. 4th 221, 100 Cal. Rptr. 2d 740, 748 (2000); *Save Our Springs Alliance v. City of Austin*, 149 S.W. 3d 674, 681 (Tex. Ct. App. 2004). Although this Court has not expressly addressed whether a "development agreement" for a large tract of land that adopts a site plan and zoning requirements is "legislative," such a finding appears to be implicit in *Carpenter v. Riverton City*, 2004 UT 68, ¶¶ 2, 9, 103 P.3d 127. CPB/Mount Holly do not cite or analyze *Carpenter*, again choosing a tactic of avoidance.

Once this Court looks at the individual and cumulative impact of the many changes found by the trial court, it is clear Ordinance No. 2007-04 reflects changes in policy when compared to the "policy of the original zoning ordinance." *Marakis*, 873 P.2d at 1124. The trial court's contrary legal conclusion must therefore be reversed.

B. The Amendments Reflected in Ordinance No. 2007-04 Are "Material"

CPB/Mount Holly argue that none of the many changes to Beaver County's existing laws are "material." While the district court agreed with this legal conclusion, the trial court's two stated grounds for agreement are incorrect. *See* Order, R 1923. First, as discussed above, CPB/Mount Holly mislead the trial court into the belief that even

mandatory provisions of the PUD law, such as open space, can be waived and the trial court expressly relied upon this misinterpretation in evaluating materiality. Order, R 1923. Such an interpretation of § 10.09.020 of the Zoning Ordinance is wrong (*see* Appellants Brief at 45-46) and it does not appear that CPB/Mount Holly argue otherwise at this stage. *See* Intervenors' Brief at 40-51 (failing to address the trial court's analysis of § 10.09.020 or BRAVE's analysis).[2] Consequently, the court's materiality analysis is legally incorrect because it assumes the absence of a change in the law.

Second, the trial court evaluated materiality from the standpoint of prior "concept plan" approval for proposed developments with "densities greater than the densities contemplated by the Development Agreement." Order, R 1923. This interpretation of the undisputed facts is incorrect and legally misplaced in all events. To the extent prior plans were reviewed as "concepts" by someone within Beaver County, absolutely no entitlements or approvals to build were **ever** granted by the County under its existing laws. *See* Appellants Brief at 51 (citing testimony). The entire "concept plan" process is designed to be an "informal preliminary review" (Pls. Ex. 26 at 3, ¶ 2-1.7) that CPB/Mount Holly has stated serves only as a means to identify issues, not as a type of approval. *See* Appellants Brief at 52, n.15 (citing CPB/Mount Holly letter in connection with prior administrative appeal). Further, there is no evidence that any of the prior

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[2]To the extent CPB/Mount Holly addresses § 10.09.020 it does not argue that the "approved plan" and the "imposed general requirements" of the PUD statute (including, for example, open space) are non-mandatory and can be waived. *See* Intervenors' Brief at 43, n.14.

"concepts" involved the particular modifications to existing law found in Ordinance No. 2007-04.

What matters is not what "concepts" were previously proposed but instead whether the changes to existing laws reflected in Ordinance No. 2007-04 are "material." On that score, the answer is clear. For example, elimination of all open space and additional mandatory requirements of the PUD statute is "material" (and certainly not something waived by a prior "concept plan" approval for a proposed development that would not be private or gated). *See* Appellants Brief at 14-24, SOF ¶¶ 27-32. Similarly, modifying the mandatory provisions of the General Plan, the Zoning Ordinance and the Subdivision Ordinance to eliminate the requirement for proof of water rights and feasibility **before** any approval is clearly "material." *Id.*, SOF ¶¶ 20-24. Eliminating the Board of Adjustment and making the appeal and enacting body one in the same is clearly "material." *Id.* SOF ¶¶ 25-26. Creation of 24 "permitted uses" that are non-existent under current PUD law and a procedure for approval that does not exist is "material." *Id.*, SOF ¶¶ 33-34. Modifying mandatory language of existing law to allow golf course construction and other work before approval is likewise "material." *Id.*, SOF ¶¶ 35-38. Waiving the requirement of resubmission of plans if approval is not obtained within six months is clearly "material." *Id.*, SOF ¶¶ 39-40. Taking action to relocate a dedicated road is clearly "material." *Id.*, SOF ¶¶ 41-42. Finally, severely limiting future legislatures and/or administrators to not take away any "uses, densities, rights and obligations" of Ordinance No. 2007-04 is "material." *Id.*, SOF ¶ 43.

Unfortunately, neither the trial court nor CPB/Mount Holly analyzed the "materiality" of each of these changes. When each one is considered on its own, as well as cumulatively, as *Marakis* dictates, "materiality" is undeniable.

IV. SENATE BILL 53 DOES NOT MODIFY THE NEED TO DRAW THE ADMINISTRATIVE/LEGISLATIVE LINE.

In their Reply Memorandum in Support of Motion for Summary Disposition and Suggestion of Mootness ("CPB/Mount Holly's Summary Disposition Brief"), CPB/Mount Holly takes inconsistent positions on whether Senate Bill ("SB") 53 has any impact upon *Marakis* and the need to draw an administrative/legislative line with respect to Ordinance No. 2007-04. On the one hand, CPB/Mount Holly claims SB 53 renders this entire appeal "moot." On the other, CPB/Mount Holly states in footnote that they "do [not] suggest that Senate Bill 53 was intended to replace or remake *Marakis*." *Id.* at 9, n.9.

While BRAVE believes that SB 53 has no application to this appeal because there can be no retroactive application of substantive law (*see* Memorandum in Opposition to Intervenor's Motion for Summary Disposition and Suggestion of Mootness at 3-9) ("BRAVE Summary Disposition Brief"), CPB/Mount Holly made two new arguments in their reply that suggest *Marakis* is irrelevant. Those two arguments must be responded to in addressing *Marakis*.

First, CPB/Mount Holly argues in essence that as a result of SB 53, a right of referendum exists at the state level for SB 53 but not at the level of county government for Ordinance No. 2007-04. CPB/Mount Holly relies upon *Dewey v. Doxey-Layton*

Realty Co., 277 P.2d 805 (Utah 1954) in making this bold claim. However, to begin, *Dewey* has no application to referendum and deals only with initiative. *Id.* at 808 ("As to zoning ordinances, although there are many cases which apply the provisions of a referendum act, we have not been cited to a case where zoning by initiative was accepted by the courts"); *see also Garvin v. Ninth Judicial Dist. Ct.*, 59 P.3d 1180, 1188-89 (Nev. 2002) (discussing Utah cases and concluding *Dewey* is limited to zoning by initiative).

Although somewhat difficult to track, CPB/Mount Holly's argument under *Dewey* appears to be that the power to legislate zoning exists at the state level and is only "delegated" to county governments under LUDMA, and now allegedly under new SB 53. The obvious problem with this position is that even if the power to pass legislative zoning is "delegated" to county government, CPB/Mount Holly cannot argue that Beaver County did not have the actual power to pass Ordinance No. 2007-04.

Consequently, once Beaver County chose to exercise its right to legislate zoning by passing Ordinance No. 2007-04, the Utah Constitution **mandated** that the local citizens have a right to pursue referendum for such a legislative act **by Beaver County**. *See* Utah Const., Art. VI, Section 1(2)(b)(ii) ("The legal voters of any county . . . may . . . require any law or ordinance passed by the law making body of the county . . . to be submitted to the voters"). The citizens of Beaver County have not collaterally attacked a state law by seeking initiative as was alleged in *Dewey*. Instead, they have pursued their constitutional right to **veto a local law** properly passed by county government pursuant to legislative authority of that County. This Court has been clear that the **local citizens** have

this fundamental right of veto. *Marakis*, 873 P.2d at 1122 (local legislative zoning is "subject to referendum"); *Mouty*, 2005 UT 41, ¶ 14 ("article VI presents referable laws from taking effect until local voters have had the opportunity to exercise their right to seek a referendum").

Second, in discussing SB 53, CPB/Mount Holly goes to great lengths to feign a lack of understanding regarding the distinction between an original legislative enactment of a zoning ordinance and a subsequent administrative "implementation" of a pre-existing ordinance, calling this distinction "finely diced" and "highly-nuanced." In reality, this distinction is simply Utah law--it is *Marakis*. Consequently, BRAVE's position is exceedingly straightforward. SB 53 uses language very similar to *Low* and *Marakis* and thereby appears to adopt *Marakis* by prohibiting referendum only for "implementation of a land use ordinance" not for original adoption of a **legislative** zoning ordinance. Utah Code Ann. § 20A-7-401(2).[3] If this language is read to represent no change in Utah law and the enactment of a legislative ordinance is outside the scope of the statute, as the legislative history seems to suggest,[4] then the law is constitutional but it has no application to the original enactment of Ordinance No. 2007-04. If, as CPB/Mount Holly

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[3]The language eliminating the right of initiative is broader and BRAVE need not address the constitutionality of that broader language.

[4]CPB/Mount Holly's citation to the legislative history leaves one scratching their head. *See* CPB/Mount Holly Summary Disposition Brief, at 6, n.4, and 12, n.11. While CPB/Mount Holly argues the history is not clear that original enactment of a land use ordinance is subject to referendum while implementation thereafter is not, that is precisely what the legislators say as quoted by CPB/Mount Holly. *See also* BRAVE Summary Disposition Brief at 5-6, 12-13 (quoting legislative history).

suggests, SB 53 can somehow be retroactively applied to the original enactment of Ordinance No. 2007-04, then SB 53 is clearly unconstitutional as applied to Ordinance No. 2007-04 for the reasons stated in BRAVE's prior memorandum. *See* BRAVE Summary Disposition Memo at 3-7, 9-16.

V. NOTICE OF THE APRIL 2, 2007 PUBLIC HEARING WAS IMPROPER.

Beaver County has filed a brief on the notice issue raised by BRAVE concerning the April 2, 2007 public hearing. Beaver County does not dispute the key facts that on March 27, 2007 the Planning Commission made many changes to the proposed Development Agreement, that the draft incorporating these changes was not available until Friday afternoon, March 30, 2007 for a public hearing scheduled for Monday, April 2, 2007, or that significant additional changes were made after the public hearing. *See* Appellants Brief at 24-27, SOF ¶¶ 44-50.

Beaver County instead argues that none of the many changes made over this highly concentrated period of time "altered its basic effect or general nature." However, Beaver County's argument is contrary to the trial court's express finding that the changes made after the March 28, 2007 meeting of the Planning Commission were "significant." *See* Order, R 1893. Further, other "significant" changes, as characterized by Beaver County's own witnesses, were made after the public hearing not based upon public comment but based upon meetings between CPB/Mount Holly and Beaver County held **after** the comment period ended. *See* Appellants Brief at 26-27, SOF ¶¶ 49-50.

In addition, while Beaver County purports to dispute the number of changes made, BRAVE's statement is supported by the record. *See* Appellants Brief at 54 (citing record). Further, Beaver County's recitation of some of the changes demonstrates the critical importance of these changes. Specifically, ski access for all county residents or other owners who own property within the boundaries of the ski area and PUD was eliminated entirely. Appellants Brief at 26, SOF ¶ 50. Proof of water rights and feasibility before approvals was deleted. *Id.* at ¶ 49. The entire consideration to Beaver County from the developer was also materially changed. *Id.* at ¶ 50.[5]

Less than a single business day's notice of "significant" changes was simply not "reasonable" notice as required by Beaver County's own ordinance and due process.

CONCLUSION

This Court should order that because Beaver County is estopped to claim that Ordinance No. 2007-04 is "administrative," the citizens have a right to pursue referendum for that law. Alternatively, this Court should order that under *Marakis*, Ordinance No. 2007-04 is legislative and the citizens have a right to pursue referendum for that law.

DATED this 16th day of September, 2008.

Joel Ban
Attorney for BRAVE

[5]Other significant changes were made during this time frame, including elimination of the role of the Beaver River Water Commissioner, as advocated by BRAVE. *Compare* Plf. Exs. 12, 14 and 16.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Reply Brief of Appellants** to be served by the method indicated below this 16 day of September, 2008, to the following:

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